Federal Judicial Reform and Proslavery Constitutional Theory: A Retrospect on the Butler Bill

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Slavery expansion, territorial development, and abolitionism have colored the efforts of historians attempting to explain the "lesser issues" of the 1850's. This phenomenon of reductionism appears most vividly in the traditional treatment afforded efforts to reform the ante-bellum federal judicial structure. In the 1850's, Congress failed to enact legislation alleviating the pressures on a strained federal judicial establishment because "profounder issues . . . were absorbing the energies and arousing the emotions of Congress. The lesser issue of judicial reform was side-tracked and partly engulfed by its political and personal realities to the transcendent controversy of slavery. Everything was subordinated to the impending conflict."[1] The evidence, however, suggests a different conclusion. As late as 1855 Congress debated and acted upon important questions relating to an improvement in the operations of the federal judicial system. Far from being "side-tracked" and "engulfed" by slavery, the question of judicial reform became subtly linked to sectional expectations and demands on the slavery-extension question.

The sectional controversy shaped the dimensions of the debate over the federal judiciary, with opposing sectional antagonists in the Congress adhering to differing interpretations of the Constitution. These conflicting notions about the Constitution in turn found expression in the attitudes men held about the structure and functioning of the federal courts. At least one authority has pointed to the crucial role played by the federal courts in the development of proslavery constitutional theory.[2] The federal courts offered the

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1. Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 54 (1927). Richard J. Richardson and Kenneth N. Vines, *The Politics of the Federal Courts* 28 (1970) also explains the failure of reform in terms of the "procrastinations of pre-Civil War Congresses."

2. Arthur Bestor, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860," 54 *J. Ill. St. Hist. Soc.* 166-167 (1961).

possibility of insuring that the minority position of the South on the slavery expansion issue would remain ascendant over the will of any potentially threatening popular majority. If reliance on the federal judiciary was in fact an important component of Southern constitutional strategy, then efforts to alter the judicial system should have elicited profound stirrings among legislators in the 1850's. Moreover, given the fact that proslavery constitutional theory denied the operation of popular majorities, it seems reasonable to suspect that this antimajoritarian thinking would also find expression in Southern attitudes toward judicial reform.

Efforts to reform the judicial structure of the nation reached their apogee during the Thirty-third Congress. During the second session of that Congress, the Senate engaged in important and sustained debate over the future of the federal judicial structure. The Thirty-third Congress enacted significant legislation creating a Court of Claims, increasing the salaries of Supreme Court Justices, establishing a circuit court for California, and dividing the district courts in Ohio and Illinois. It also debated, but failed to act on, proposals to reorganize the federal judiciary in the District of Columbia and to equalize the salaries of all federal judges.[3]

The most important bill relating to the judiciary reported to the Congress during the Thirty-third Congress was the proposal of Senator Andrew Pickens Butler of South Carolina, Chairman of the Senate Committee on the Judiciary, to "modify and amend the judicial system of the United States."[4] This proposal set forth a scheme of reform more far-reaching in its purpose and scope than the relatively bland Judiciary Act of 1862, although the latter has clearly received more attention from historians.[5] Although it failed to receive Congressional endorsement, the Butler bill represented the most direct and realistic effort during the 1850's to adjust the federal judiciary to the realities of geographic expansion and population increase. The Butler bill had its genesis, however, in

3. The birth of the Court of Claims is treated in Leonard D. White, *The Jacksonians, A Study in Administrative History, 1829-1861* 157-162 (1954). But see also 18 *The Monthly Law Reporter* 406-408 (Nov. 1855), and 10 *Stat.* 612. The other acts are found in order at 10 *Stat.* 655, 10 *Stat.* 631, and 10 *Stat.* 604, 606. The debates are in *Cong. Globe*, 33rd Cong., 2nd Sess., 127, 388, 400, 423, 636, 723, 732, 891, 909; 116, 120-123, 127, 1059, 1173, 1179, 1183; 630, 715, 773, 774, 1178; 630, 715, 970, 995; 631, 648, 692.

4. *Cong. Globe*, 33rd Cong., 1st Sess., 924.

5. David Silver, *Lincoln's Supreme Court* 48-56 (1956); Stanley Kutler, *Judicial Power and Reconstruction Politics* 10-18 (1968); Frankfurter and Landis, *op cit. supra*, note 1, at pp. 54, 58, 70n.

nearly two years of preparation by Caleb Cushing, Attorney General under President Franklin Pierce.[6]

By the early 1850's the judicial system of the United States groaned under the mounting legal business of the nation. The Supreme Court Justices labored under the burden of a crowded docket made more onerous by the necessity of having to fulfill circuit riding duties. The circuits were disparate in terms of population, and five states admitted to the Union after the Judiciary Act of 1837 had not gained entrance into the circuit court system.[7] The federal government had no central office charged with the supervision of the legal business and personnel of the government, with a resulting loss of administrative control and direction. The Attorney General, while theoretically the chief legal officer of the nation, oversaw the operation of a tiny office with no clear mandate to supervise the legal business of the nation.[8]

In March, 1853, Caleb Cushing assumed the office of Attorney General with these problems before him. A Massachusetts Democrat with experience as a judge and lawyer in the Bay State, Cushing possessed the requisite qualifications to perform the duties of Attorney General. An articulate writer, a gifted speaker, and a consummate politician, Cushing dominated the Pierce cabinet.[9] The first Attorney General to serve as an equal with other cabinet members, Cushing committed his full energies to his new duties.

On entering office in 1853 Cushing moved forcefully in two areas. Initially, the Attorney General requested his clerk, George Bibb, to prepare a detailed outline of the responsibilities of the

6. For a limited discussion of the Butler bill see Roy F. Nichols, *Franklin Pierce* 299, 352, 379 (2nd ed. rev. 1969); Claude M. Feuss, 2 *The Life of Caleb Cushing* vol. 2, 180 (1923); Kutler, *op. cit. supra* note 5, pp. 53-54; Charles Warren, *The Supreme Court in United States History* vol. 2, 266-267 (1926).

7. The structure and problems of the federal courts in the antebellum period is ably discussed in Erwin C. Surrency, "A History of Federal Courts," 28 *Mo. L. Rev.* 214-244 (1963). The role of the West and the idea of judicial representation in the Judiciary Act of 1837 is discussed in Curtis Nettles, "The Mississippi Valley and the Federal Judiciary, 1807-1837," 13 *Mississippi Valley Historical Review* 202-226 (1925). For an acute analysis of the problems confronting the judiciary see James Bayard in *Cong. Globe*, 33rd Cong., 2nd Sess., Appendix, 85-91.

8. Arthur J. Dodge, *Origin and Development of the Office of Attorney General,* House Miscellaneous Document, No. 50, 70th Cong., 2nd Sess., Ser. No. 9035 gives a brief history of the office emphasizing its slow development prior to 1871. See also Albert G. Langeluttig, *The Department of Justice of the United States* 1-9 (1927).

9. Feuss, *op cit. supra*, note 6, at p. 186.

nation's chief legal officer. After combing the *Statutes at Large*, Bibb reported that the assigned duties were "at best limited."[10] At the same time, Cushing sought control over the judicial patronage of the Pierce administration. With strong support from Secretary of State William Marcy, whose office controlled the appointments of most governmental officials, Cushing attained his objective. In quick order, Marcy prepared a memorandum through Pierce to Cushing giving the Attorney General full responsibility for overseeing the appointments of clerks, marshalls, and district attorneys.[11]

With firm control over appointments, Cushing turned his attention to the implementation of a broad range of judicial and legal reforms which included revision and possible recodification of the *Statutes at Large*, establishment of federal penitentiaries, increases in the number of federal court buildings, administrative reforms in the office of Attorney General and the government as a whole, and most importantly modification of the judicial structure of the United States. Cushing sought a comprehensive program of legal and judicial reform requiring the support of the legislative and judicial branches.

In March, 1853, Cushing turned to Associate Justice Benjamin Robbins Curtis for his views on judicial reform. In response to the Attorney General's request, Curtis sketched a series of proposed changes for the federal judiciary. "I believe," Curtis commented, "they are entertained by my bretheren (sic) as well as by myself, but I am not authorized to speak for them." Curtis argued that the "existing judicial system of the United States does not satisfy the wants of the country, & is not capable of being so extended as to meet even existing wants." Curtis pictured the judiciary as caught up in a profound dilemma. The possibility of an immediate increase in the number of states, not to mention those admitted since the Judiciary Act of 1837, made extension of the system necessary, but "absolutely impracticable." Any increase in the number of circuits would mean a similar increase in the number of Supreme Court Justices which Curtis found "already too large for the convenient dispatch of business, & perhaps what is gained from a greater number of persons writing in the decision of legal questions, is more than counterbalanced by dividing the responsibility for their decision." The enlargement in the business of the Supreme Court also made it difficult for the Justices to devote their full energies to business on the circuits. In attempting to do two jobs at once, Curtis

10. Bibb to Cushing, March 19, 1853, Memorandum of Duties, Box 63, Cushing Papers, Library of Congress.

11. William Marcy to Cushing, March 31, 1853, Box 63, Cushing Papers, L. C. See also Feuss, *op cit. supra*, note 6, at p. 136.

feared that the Court was doing neither satisfactorily. An increase in the number of circuits would only further deter the Justices from their primary responsibilities in Washington.[12]

Curtis deemed it expedient to "divide the States into convenient Circuits, & appoint a Circuit Judge for each circuit & transfer to him all the powers now exercised by a Judge of the Supreme Court in his Circuit. This would preserve the present system, merely substituting, in place of the judge of the Supreme Court, Circuit Judges." The Massachusetts Justice believed the strength of his recommendation emanated from its conservative character. The people, Curtis believed, understood and trusted the judicial system. Any manifest alteration in the nature and duties of the inferior courts would only lead to doubts, confusion, and suspicion.[13]

Yet Curtis realized that his proposal would also create problems. Subscribing to the old Jeffersonian ideal that judges should go out among the people, Curtis noted that "it is obvious that the judge of the Supreme Court, under this plan, would have no duties out of that Court. This is an evil. . . . It is for the advantage of the country that they should come more immediately in contact with the people, & should be personally known to the Bar; & it is no small advantage to them as lawyers to preside at *Nisis Prius*." Nevertheless, Curtis could foresee no other option because the business of the Court at Washington was "likely to be so large, as to afford full employment for its Judges." Curtis concluded his recommendations to Cushing with a plea that the size of the Court be reduced from nine to seven by not filling the next two vacancies to occur on the Court.[14]

Whether or not the Curtis proposal reflected the consensus of the Court is difficult to ascertain. Certainly, the Justices found the rigors of the circuits difficult and time-consuming, and they had historically welcomed efforts to diminish their roles in the circuit courts.[15] As to a reduction in the size of the Court, the pic-

12. Curtis to Cushing, March 21, 1853, Box 63, Cushing Papers, L. C.

13. Curtis to Cushing, March 21, 1853, Box 63, Cushing Papers, L. C.

14. Curtis also advised that the 2,000 dollar minimum for bringing cases before the federal bench be continued and that the Congress appropriate "liberal salaries" in order to 'command for these duties in the Circuit Courts the best legal talent and character. . . . " Curtis to Cushing, March 21, 1853, Box 63, Cushing Papers, L. C. On Curtis' support of circuit duty see Benjamin R. Curtis, *A Memoir of Benjamin R. Curtis, LL. D.* vol. 1, 157 (1879).

15. The biographical literature is overwhelming in arguing that the

ture is even less clear. The most salutary method of reducing the size of the Court would have been through the failure of the President to fill vacancies occurring by resignation or death. Any effort to remove the Justices by summarily reducing their numbers would probably have met with opposition from the Court inasmuch as it would have amounted to a direct attack on its credibility and authority.

By December of 1853 Cushing had formulated the basis of his proposed revision of the circuit court system and the legal business of the nation. He wrote Curtis in November that "I have good reason to believe that the President will recommend your proposal to the consideration of Congress."[16] Pierce's message of December 5, 1853, reflected Cushing's readiness to put his reform plans before Congress. Pierce informed Congress that the "organization of the courts is now confessedly inadequate to the duties to be performed by them. . . . I will present to you, if deemed desirable, a plan which I am proposed to recommend, for the enlargement and modification of the present judicial system."[17]

Congress responded to the president's invitation by requesting his plan for reorganization. In two separate messages Pierce laid Cushing's proposals before Congress: one treating the question of judicial reform and the other important aspects of legal reform.[18] In the second report surveying the status of the legal business of the country Cushing noted the "vast augmentation" which had taken place. He recommended that the Attorney General be given control over the legal business of the other departments of government. He also encouraged the enactment of legislation to preclude the Attorney General from engaging in private practice while serving in the cabinet. "Formerly, in an age of simpler manners," Cushing concluded, "when the public expenditures were less, the number of places less, the population of the country less, the frequentation of the capital less, the ingenuity of self interests less,"

Justices disliked the rigors of circuit duties. For example, see Francis P. Wisenburger, *The Life of John McLean* 180-187 (1937); John P. Frank, *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860* 150-167 (1964).

16. Cushing to Curtis, November 22, 1853, Folder #15, Papers of Benjamin Robbins Curtis, L. C.

17. House Document No. 1, 33rd Cong., 2nd Sess., Ser. No. 710, 13-14.

18. Senate Document No. 41, 33rd Cong., 1st Sess., Ser. No. 698 outlines Cushing's new judicial system. Senate Document No. 55, 33rd Cong., 1st Sess., Ser. No. 698 contains his proposed changes in the conduct of the legal business of the nation. See also 6 *Opinions of the Attorney General* 326 (March 8, 1854) and 442 (April 7, 1854).

there was reason for the Attorney General to occupy himself only part time with the duties of his office.[19] By 1854, however, administering the legal affairs of the government constituted a full time job. Nevertheless, Congress buried his request for legal reform in committee.

The Attorney General's proposals for judicial reform elicited a different response from the Congress. Describing his program as "involving the least possible . . . innovation," the Attorney General proposed the creation of a separate body of nine circuit judges who would devote full time to the conduct of the business of the circuit courts. The Supreme Court Justices, however, would continue to attend regular sessions of the circuit courts, although the burden for the day-to-day operation of these courts would fall on the newly appointed circuit judges. Cushing eliminated entirely the district court judges from their role in the operation of the circuit courts. If a Supreme Court Justice could not attend a session of the Court, the circuit court judge would have the authority to hear cases in his absence. Of the five states not included in the old circuit courts, Cushing excluded only California from the new arrangement. The Attorney General noted, however, that Congress should add California to the circuit court scheme in a tenth circuit with the soon-to-be states of Oregon, Washington, and Utah.[20]

Cushing argued that such a plan retained the more workable aspects of the old judicial structure while providing "the additional personal force requisite for the prompt dispatch of the enlarged judicial business of the country." It avoided increasing the membership of the Supreme Court, and promised that the Justices would have some relief from their circuit duties. At the same time, the proposal perpetuated "the justices of the Supreme Court in the practice of immediate contact with the people of the States, but relieves them by law from the disagreeable necessity of seeing themselves constrained, from time to time, either to leave much of the circuit business unperformed or performed only by the district judge, or else to fail in the complete discharge of the proper duties of the Supreme Court."[21]

In setting forth his proposal, Cushing endeavored to balance the Jeffersonian ideal of judicial representation with the reality of geographic expansion and increased business for the Supreme Court. He argued that the central question in any reform plan was the need "to have the justices of the Supreme Court continue to be radicated, by local residence and by official relation, in the respective States." Yet he also noted that "the general sense of this it is

19. Senate Document No. 55, pp. 19, 20.
20. Senate Document No. 41, pp. 10, 9.
21. Senate Document No. 41, p. 9.

which has obstructed the introduction of proper improvements in the judicial system." Sensing that elimination of all circuit duties for the Justices would arouse Western antagonism, Cushing refused to adopt the more far reaching Curtis proposal.[22]

Curtis, however, remained adamant in his demand for an end to circuit duties. With regard to Cushing's proposal, Curtis complained that "I do not think the bill . . . would enable the Justices of the Supreme Court to do their business, & meet the public expectations on the Circuits. Whether it could be so modified as to do so I have not been able to satisfy myself."[23] The Associate Justice also received support from his brother, George Ticknor Curtis, who admonished Cushing not to remove the district judges from their duties in the circuit courts. "I am persuaded," Curtis noted, "that it will be found very inconvenient in practice to take from them all the powers of Circuit judges." He feared that "in our own Circuit, suppose that the Circuit Judge were a citizen of New Hampshire, or any other state than Mass., and the Judge of the Supreme Court is six months in the year at Washington, who is to make the interlocutory order in equity, and do all the other business at Chambers, required every day, when the Circuit Judge is not in the District, and the Court is in vacation?" Curtis also recommended that Cushing consider allowing the district court judge to sit on the circuit court during capital trials and authorize any two of them to hold such a trial.[24]

Other members of the Court also expressed their hope for reform. On March 25, 1854, Associate Justice John Catron wrote Cushing to "help your flagging spirits a trifle. . . ." Catron informed Cushing "that I am determined to agree to any arrangement, having your element of circuit judges. . . ." As for Curtis and the others on the Court, Catron stated that "my Brother Curtis goes with us heart & hand. . . . Curtis does not doubt, nor do I, that Nelson, Grier, & Campbell, will act in concert with us. . . . Nor have I much fear of Wayne, going quietly along." Catron concluded on a partisan note by stating that "this administration has summoned the courage for the first time in *fifty* years, to aid the Judicial Department, & keep it from breaking down; & it is due to you Young Americans, that the Court & your fellows, should back you."[25]

22. Senate Document No. 41, p. 8.

23. Curtis to Cushing, March 1, 1854, Box 68, Cushing Papers, L. C.

24. George Ticknor Curtis to Cushing, March 17, 1854, Box 68, Cushing Papers, L. C.

25. John Catron to Cushing, March 25, 1854, Box 68, Cushing Papers, L. C.

As an afterthought, Catron echoed the concern expressed by Curtis over future circuit duties for the Justices. On the back of the letter Catron penned an admonition to Cushing to word his bill to Congress in such a way that when it spoke of the circuit duties of the Justices it would say: "Provided, however, that it shall be the duty of the Judges of the Supreme Court, to hear & determine at each term, all the causes pending in said Court, if it is in their power to do so; and that this shall be their paramount duty and shall be first performed regardless of all other duties imposed by this act."[26]

Other responses to the Cushing program were less reserved. Samuel Rossitor Betts, District Judge for the Southern District of New York, commended Cushing for his proposals. "It is difficult to conceive," Betts noted, "how any constitution of the Supreme Court can enable its members to conduct the numerous circuits and also fulfill the higher functions of a court of last resort. You have put the argument in its full strength against collecting the large body of judges necessary to these primary duties, into a single tribunal. . . ." Betts also applauded Cushing's report calling for centralization of the legal business of the government. Betts was persuaded that "if Congress had the opportunity to act upon the measures so ably set forth in your Reports, that both will be substantially adopted."[27]

Betts proved to be a poor judge of the political realities in Washington. While Cushing could recommend changes, it remained for Congress to legislate his program into reality. Cushing appreciated this fact and he worked diligently to win the support of the Chairman of the Senate Committee on the Judiciary, Andrew Pickens Butler of South Carolina, as well as Stephen Douglas, the anti-administration leader of the Western Democrats. Through the first three months of 1854 Cushing closeted himself with Butler, Douglas, and members of the Supreme Court.[28]

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26. Catron to Cushing, March 25, 1854, Box 68, Cushing Papers, L. C.

27. Samuel Rossiter Betts to Cushing, May 15, 1854, Box 69, Cushing Papers, L. C. Cushing's proposed reforms elicited a good deal of favorable correspondence See especially Richard Rush to Cushing, May 22, 1854, Box 69, and John H. Clifford, March 24, 1854, Box 68, Cushing Papers, L. C. The reaction of the press was generally subdued. Only the Democratic controlled Washington press commented. The editor of the *Washington Daily Union*, March 14, 1854 noted that Cushing's report "had fully comprehended the subject in all its bearing, and has displayed unusual power in its elucidation."

28. The Cushing Papers clearly indicate that the Attorney General was in close contact with legislative and judicial leaders during the

Despite Cushing's maneuverings the Pierce administration could not harmonize support in favor of its reform proposal. The Eastern and Southern majority on the Senate Judiciary Committee demanded that any reform measure eliminate the Justices from their circuit duties. A minority of the committee, led by Senator Henry Geyer of Missouri, a Democrat, argued that Congress should sustain the Justices in their circuit duties.[29] The committee agreed, however, to present a unified front to the Senate. On April 17, 1854, Senator Butler laid the Judiciary Committee proposal before the Senate. At the same time, Douglas, representing the sentiments of Geyer of the committee and other dissident elements from the West, offered a substitute measure retaining the Supreme Court Justices in their circuit duties.[30] The Senate, caught up in the furor over the Kansas-Nebraska bill, allowed the judicial reform proposals to languish as the first session of the Thirty-third Congress concluded.

On January 5, 1855, Butler reintroduced his bill, stating that "it is the only bill which can be passed, and . . . receive my vote."[31] The Butler measure was no mere lawyer's bill. To the contrary, it clearly reflected the wishes of Curtis and Catron for an end to circuit riding. The Butler bill proposed the creation of a separate body of "circuit judges" to hold the circuit courts with the assistance of the district court judges in the circuits. The number of circuits would increase from nine to eleven, with California forming the eleventh circuit. The Justices of the Supreme Court, however, retained their "jurisdiction and powers . . . within any of the circuits in which they may reside, in allowing writs of *habeas corpus* and error, granting injunctions, and doing all the other acts which may be done at chambers and out of terms."[32] The committee proposal also brought the five states excluded under the old

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period. See Andrew P. Butler to Cushing, January 12, 1854, Box 68; D. R. McNair to Cushing, March 16, 1854, Box 68; John Catron to Cushing, March 26, 1854, Box 68; Peter V. Daniel to Cushing, March 30, 1854, Box 68; Thomas P. Morgan to Cushing, July 20, 1854, Box 69; Andrew P. Butler to Cushing, 1854 (?), Box 71, Cushing Papers, L. C.

29. *Cong. Globe,* 33rd Cong., 2nd Sess., 212.

30. A similar bill was introduced in the House of Representatives on April 13, 1854 by Frederick P. Stanton of Tennessee. The bill was read and sent to the House Committee on the Judiciary where it died. *Cong. Globe*, 33rd Cong., 1st Sess., 912.

31. *Cong. Globe,* 33rd Cong., 2nd Sess., 192.

32. The full text of the Butler bill was printed in *The Charleston Daily Courier,* January 19, 1855. The debates were also fully covered in *The National Intelligencer,* December 23, 1854, January 18, 20, and February 22, 1855.

arrangement into the circuit court system. The territories, however, retained their unique status as separate entities in the judicial structure. The bill also continued the old arrangement of placing slave states in circuits separate from the free states.

In supporting the measure, Butler presented the usual catalogue of problems confronting the federal courts. The size of the nation and the increase in its legal business had outstripped the ability of the federal judiciary to render effective justice. Butler emphasized the salutary political consequences the plan would have over the administration of justice. He proclaimed that "political questions have so far made their way into that court that it has to be a judicial representative of the different parts of the United States. Every part of the United States is claiming a right to have a judge, a judicial representative, upon that bench." Butler preferred to "have cases come before the Judges of the Supreme Court in such a manner that their minds shall be perfectly prepared to give them a fair consideration, unaffected by local feelings or influences." He reminded his colleagues that because of "the great sectional prejudices that prevail in different parts of the United States, five judges from one section would not give satisfaction to another, in administering the justice of the country, even if they were angels."[33] Butler wished the Justices to be free of "local feelings and influences" and in a position from which they "could be neither insulted or accused of yielding with too much facility to prejudices of a local character."[34]

The Douglas substitute differed substantially from the Butler bill. The Illinois Democrat proposed to abolish the circuit courts giving their jurisdiction and duties to the district court judges.[35] Douglas also sought to retain the Justices of the Supreme Court upon the circuits. With regard to the proposition of the committee that the Justices sit only in Washington, Douglas stated: "I differ, *in toto*." He proposed the creation of an appellate court which would meet once a year with a Justice of the Supreme Court and all the district judges in the circuit sitting *en banc* as a court of appeals. The Illinois senator also made provision for the Justices of the Supreme Court to rotate each year in the nine different circuits.

33. *Cong. Globe*, 33rd Cong., 2nd Sess., 192. Butler's comment is prophetic given the reaction of a part of the North to the *Dred Scott* decision in 1857. See Wallace Mendleson, "Dred Scott's Case—Reconsidered," 38 *Minn. L. Rev.* 16-28 (1953). But see also Eric Foner, *Free Soil, Free Labor, Free Men* 84, 97, 100, 107, 181, 292-93 (1970).

34. *Cong. Globe*, 33rd Cong., 2nd Sess., 192.

35. The Douglas substitute is set forth at *Cong. Globe*, 33rd Cong., 2nd Sess., 193.

So that, in his words, "they could go the round until he gets back, at the end of nine years, to his own circuit where he resides, and I think he would be liberalized, and improved and benefited by the trip." Douglas planned to solve complaints of "incapacity" by providing a *per diem* allowance for those judges. "I think such a provision would really improve the health of many of the judges, so that they could take a trip to San Francisco without complaining that they would suffer very much by it; though they might find it very unhealthy if some such provision were not made." The Douglas substitute also differed from the committee proposal in that it allowed the territories to enter the circuit court system. The ninth circuit set forth in the proposal was to encompass all of California and the territories of Oregon, Washington, and Utah.[36]

Douglas defended his substitute on the basis that it would not occasion a "radical change in the judiciary of the country." Douglas feared that the circuit courts envisioned under the Butler plan would allow "new men, perhaps politicians, perhaps lawyers, who have never been upon the bench" to assume the judicial destiny of the nation. Douglas also asserted that by incorporating the territories into the circuit court the judicial system of the nation would become more "harmonious." Douglas subordinated these considerations to the overriding principle that the Justices should continue to travel the circuits. "I think it is for the good of the country," Douglas informed the Senate, "and for the good of that court, that its judges should be required to go into the country, hold courts in different localities, and mingle with the local judges and with the bar. . . . I believe . . . that the theory of the original plan in which our judiciary system was formed, was right."[37]

The judiciary committee proposal drew the bulk of its support from Southern and Eastern Democratic spokesmen. The only Whig to speak out forcefully for the measure on the Senate floor was George Badger of North Carolina. The lines were not solid, however. Senator Stephen Adams of Mississippi, a Democrat, and Judah P. Benjamin of Louisiana, a Whig, were both sharply critical of the federal judiciary as a whole and gave only reluctant support to the Douglas proposal. Adams, for instance, asserted that the federal judiciary was "a curse, and not a blessing to our people. . . . I would rather curtail, if it were possible, the jurisdiction of the Federal courts than extend it."[38] Rusk of Texas, the only Westerner

36. *Cong. Globe*, 33rd Cong., 2nd Sess., 194, 195.

37. *Cong. Globe*, 33rd Cont., 2nd Sess., 194.

38. *Cong. Globe*, 33rd Cong., 2nd Sess., 195. *The Charleston Daily Courier*, Jan. 15, 1855, described the debate as conducted with "much ardor and ability." *The National Intelligencer*, Jan. 9, 1855, indicated the debate was "critical to the interests of the nation." The Republican

to speak in favor of the Butler measure, argued that Congress had denied his state the benefits of the federal judiciary.[39] Eastern Whigs, such as Seward and Fessenden, Bell of Tennessee, a Whig, and the Democrats, Geyer, Cass and Stuart of Michigan, and Weller and Gwin of California, joined in opposition to the measure. Yet those opposed to the Butler measure did not rally round the substitute proposed by Douglas. Each had his own notion of what constituted proper reform and, as a result, on most of the roll calls involving the Butler bill, partisans were drawn up against each other.[40]

The Butler bill raised the question of the future size of the Supreme Court. The Judiciary Act of 1837 had specifically provided for an increase in the size of the Court to allow each circuit to have its own Justice to sit on the circuit court. Abolition of circuit duties under the Butler bill would mean that the original reason for expanding the Court would cease to exist. Seizing on this argument, Salmon P. Chase, Free Soil Democrat from Ohio and leader of the nascent Republican movement, offered an amendment to the Butler bill calling for a reduction in the number of Associate Justices from eight to five by not filling the positions on the high court as they became vacant through death or retirement. The office of Chief Justice, should it become vacant, would be filled in the usual manner.[41]

Southern and Democratic Justices dominated the Court, a fact of no small importance given the rapidly shifting partisan alignments following the Kansas-Nebraska Act. Yet the issue was not so much one of size as ability to speak forcefully on national issues. The Court could suffer a reduction in its numbers, by one or two, without doing serious injury to its policy-making function.

At least one authority concludes that the motivation and inspiration for the Chase amendment flowed from "the political drives of antislavery elements to alter the South's disproportionate share of power in national political institutions."[42] That conclusion cannot be the whole story. The proposed operation of the Chase amendment was hardly radical or peculiar to antislavery forces. Justice Curtis had earlier urged a reduction in the size of the Court

press was cool to the reform movement. Greeley's *Tribune*, Jan. 10, 1855, described the debate as "unimportant," but gave extensive coverage to the attack of Senator Francis Gillette, a Free-Soiler from Connecticut, on a bill to raise the salaries of federal judges and members of Congress. Henry J. Raymond's *New York Times* gave only brief notice of the debates. See also the *New York Evening Post*, Jan. 12, 1855.

39. *Cong. Globe*, 33rd Cong., 2nd Sess., 215.
40. *Cong. Globe*, 33rd Cong., 2nd Sess., 215.
41. *Cong. Globe*, 33rd Cong., 2nd Sess., 216, 217, 229, 240.
42. Kutler, *op. cit. supra* note 5, at p. 54.

from nine to seven. The operation of the amendment, in the short run at least, could have done more damage to the best friends of the antislavery forces on the Court.[43] Taney, of course, was the oldest Justice, but his death would allow the president to appoint another man to the position, and the size of the Court would not have been reduced. Given the realities of Democratic politics in the 1850's a successor to Taney's position on the Court most likely would have come from the South. A successful Northern candidate would have to have been considered safe on the slavery issue. Only the death of Justice Daniel could have brought about an equalization of the number of Justices from the South and the North. The next in line, however, was Justice McLean, a Northerner. After McLean came Catron and Wayne, both in their mid-sixties; then Nelson, Grier, Curtis, and Campbell. Over time, no doubt, the Court could have been reduced to a pro-Northern majority, but the composition of the Court, with men such as Grier and Nelson, would hardly have been the kind of supportive institution which Chase or antislavery advocates probably had in mind.

Chase's actions are better understood in terms of an attempt to divest the Court, not only of its sectional bias, but of its place as a policy-making institution. Because he could not control the composition of the Court, Chase was willing to make it as unimportant as possible. This is underscored by the nature of Chase's proposal which called for a reduction in the size of the Court to an even number of six. With an even number of Justices it was wholly possible that the Court, on important and divisive questions, would simply fail to agree because no judicial faction could achieve a majority. A divided and factious Court would have been less credible in issuing its pronouncements on national policy. Clearly, Chase had something more in mind than simply eliminating the Southerners from the Court. Butler seems to have appreciated this

43. In 1855 the ages of the members of the Court were

Justice	Age
Taney	78
Daniel	71
McLean	70
Catron	69 (?)
Wayne	65
Nelson	63
Grier	61
Curtis	46
Campbell	44

Source: Leon Friedman and Fred L. Israel (eds.), *The Justices of the United States Supreme Court 1789-1969, Their Lives and Major Opinions (1969).*

fact for he argued that if the Chase amendment was successful, the Supreme Court "in the present relations of the United States . . . could not sustain itself."[44]

The roll call on the Chase amendment underscores the Southern and Democratic support for the Court. The Democrats voted twenty-one against and five for, while the Whig and Free Soil elements voted eleven for and six against. Of the eleven Whig votes for the measure, seven came from Eastern states. Of the fourteen Southern senators voting on the amendments eleven voted in the negative. The Western states split their vote with four in favor and five against. Chase's amendment obviously touched a nerve at the South.[45]

The size of the Court, however, remained subsidiary to ending the circuit duties of the Justices. Removing the Justices from the circuits involved two separate and distinct questions. The first encompassed the efficiency and conduct of the Supreme and circuit courts. Proponents of removing the Justices from their circuits argued that age, conditions of travel, and pressing demands of the Court in Washington made elimination of circuit duty a necessity. Opponents, mostly from Western states, retorted that these conditions could be improved through a regularization of the circuit court schedule, the appointment of intermediate judges, and increased compensation for the Justices. In defense of their position they raised the second important aspect of the circuit riding controversy. Were the Justices of the Court to be judicial representatives of the sections from which they were appointed? Critics of the Butler plan answered yes, while its supporters responded in the negative. As in 1837, men from the West proved the most tenacious advocates of judicial representation.[46]

The roll-call vote on the Douglas substitute clearly indicated Western support for the continuation of the Justices on the circuits. Senatorial voting reflected a basic alliance of the East and South

44. *Cong. Globe*, 33rd Cong., 2nd Sess., 217.

45. *Cong. Globe*, 33rd Cong., 2nd Sess., 217.

46. Western antagonism toward the Butler scheme was predicated on sustaining the ideal of judicial representation in the composition and the operation of the Supreme and circuit courts. See for example, the speeches of Lewis Cass of Michigan, Henry Geyer of Missouri and John Bell of Tennessee at *Cong. Globe*, 33rd Cong., 2nd Sess., 196, 197, 211, 215. But note should also be taken of the Eastern support for these ideas which came from William Pitt Fessenden of Maine and William Henry Seward of New York, who warned that judges whose duties consisted "simply of the study of books" would "unquestionably degenerate until they would become . . . mere paper judges." See *Cong. Globe*, 33rd Cong., 2nd Sess., 214.

against the West. Of the nineteen votes cast in favor of the measure, eleven came from the Western states.[47] Southern and Eastern senators cast twenty-three of their twenty-six votes against the Douglas amendment; thirteen from the South and ten from the East. The sectional nature of the vote was underscored by the split in the party vote. Of the thirty Democratic votes on the measure, thirteen were for and seventeen against. The division among the Whigs was as close with six for and nine against. The West persisted in its commitment to the notion of judicial representation, yet it could not rally sufficient support outside of its own section to pass the Douglas bill into law. While the Senate seemed to express its willingness not to hold the Justices to their circuits, the question of the appellate jurisdiction of the proposed circuit courts blocked further progress.

The final stages of the debate centered on the issue of whether or not to sanction the establishment of "intermediate courts of appeal." The Butler bill and the Douglas substitute appeared to establish similar "circuit courts," although the Butler proposal eliminated the role of the Supreme Court Justices. The measures also differed as to the degree each of the new circuit courts would impinge on the appellate jurisdiction of the Supreme Court. As with the Chase amendment, the question of an intermediate court involved the capacity of the Supreme Court to make national policy. Once again, Butler expressed his concern that the Court would not be able to "sustain itself."[48]

Butler warned that the creation of separate appellate courts in the various circuits might mean that a series of decisions made in one part of the nation, but having an impact on all the others (i.e. slavery), would not reach the Supreme Court. If litigants brought a similar case several years later challenging the ruling of an intermediate tribunal, the possibility would exist that the Supreme Court might not act because of the force of "popular opinion, and the weight of the judgment of this intermediate court against it." Of course, Butler went on, if the Court did reverse the decision, then the weight of law would be "unsettled" and "there would always be uncertainty as to what would be the opinion of the Supreme Court." The Court would also face special hazards in hearing cases in which the intermediate tribunal had rendered a unanimous, or near unanimous decision. If a Supreme Court Justice found himself in a minority, "his general authority, as contemplated by the Constitution, would be impaired."[49]

47. *Cong. Globe*, 33rd Cong., 2nd Sess., 298, 299, 300.
48. *Cong. Globe*, 33rd Cong., 2nd Sess., 257, 258.
49. *Cong. Globe*, 33rd Cong., 2nd Sess., 258.

Butler's intransigence over the intermediate court issue caught his supporters unaware. Isaac Toucey of Connecticut who had consistently supported Butler in debate reminded the South Carolina Senator that "the bill which the Senator reported from the Judiciary Committee, establishes an intermediate court between the Supreme Court and the district courts; and I have not understood that it was any part of the plan of the Judiciary Committee to abolish that intermediate court." Butler admitted that he was "rather embarrassed" over the disagreement, but his position remained immovable.[50]

With a rift between the supporters of the Judiciary Committee bill, and with some disagreement between the supporters of the Douglas substitute, the debate over judicial reform collapsed as various senators offered their own pet plans.[51] In reviewing the debate, the *Charleston Daily Courier* concluded that "it becomes more and more evident that the different views entertained by the Senators on the subject cannot be reconciled."[52]

On January 18 the Senate voted twenty-nine to thirteen to postpone further discussion of the Butler bill until December 1, 1855. Support for postponement came from Democrats, Whigs and Free Soilers alike. Of the sections, the South voted overwhelmingly for postponement, with fourteen of its seventeen votes in favor of putting off the Butler measure.

Thus, the demise of the Butler bill blunted the major thrust of the Cushing reform program. Administration reform efforts, however, did not languish because they were overwhelmed by the "transcendent controversy of slavery." Rather, the senators could not arrive at a consensus about the role of the federal judiciary as a policy-making institution. Not once during the course of the two week long debate did the Senate address the problem in the context of the issue of slavery. Rather, planning and debate on the judicial reform issue reflected a concern for the means by which the judiciary was to function. Cushing, Curtis, Catron, and the senators weighed the relative merits of such questions as judicial representation, size of the Supreme Court, and the role of intermediate courts of appeal. Even the efforts of Chase to undermine the Court, in the guise of reform, did not manifest the vindictive radicalism which animated post-*Dred Scott* attacks on the Taney court.[53]

50. *Cong. Globe*, 33rd Cong., 2nd Sess., 257.

51. Bell of Tennessee, Clayton of Delaware, and Geyer of Missouri offered competing schemes of reform. See *Cong. Globe*, 33rd Cong., 2nd Sess., 294, 259, 216.

52. *Charleston Daily Courier*, January 22, 1855.

53. For instance, the efforts of John P. Hale in 1861 to reduce the Court to impotence was more direct than the effort of Chase in 1855.

Yet there seems little doubt that each section assumed positions on judicial reform derived in part from dominant sectional interests. The anxiety of the South over the perpetuation of the Court as an important policy-making body sprang from its overwhelming concern for giving proslavery constitutional theory a national forum. The voting responses of the Southern senators on the Chase amendment, and the general leadership exercised by Andrew P. Butler, seem to indicate that the South, as a whole, would only agree to reform proposals which would sustain or increase the authority of the Supreme Court to make national policy pronouncements. Butler's animus against any proposal to make the Court less able to speak with authority on national issues is clear proof of this. Some Southerners, such as Adams of Mississippi, talked about reducing the influence of the federal judiciary, but they could not bring themselves to vote for the Chase amendment.

Southern and Western senators agreed on one aspect of judicial representation: the Court should reflect sectional interests. The two sections could not agree, however, on the other aspect of judicial representation: the influence of popular opinion on the Justices. Essentially, the South adopted one-half of the judicial representation theory: that half most congenial to their own special requirements of a judicial branch supportive of proslavery constitutional theory. In arguing their case they could point to the realities of transportation and geographic expansion, but at the same time they could also assert, somewhat hypocritically, that sectional stress in the Union had to be balanced in the Court if it, and the nation, were to remain viable. Not once during the debate did supporters of the Butler bill attack their protagonists on grounds that the Douglas substitute would bring an end to sectional representation on the Supreme Court. Rather sides were drawn up over how much impact popular will should have on the right of the Court to *speak for the nation*.

The debate over the Butler bill supports the conclusion that proslavery constitutional theory represented an aggressive demand on the part of the Southern slave interests to use national institutions to protect their rights. By the mid-1850's the federal judiciary proved the most viable mechanism for furthering those interests.

Cong. Globe, 37th Cong., 2nd Sess., pp. 8, 26-28. In 1858 a more moderately inspired reform effort under the leadership of Congressman Benjamin Stanton, an Ohio Republican, also failed. See *Cong. Globe*, 35th Cong., 2nd Sess., 197. Representative James M. Ashley, another Ohio Republican, made a slashing attack on the Court in 1860, but his effort was more rhetorical than reform minded. *Cong. Globe*, 36th Cong., 1st Sess., Appendix, pp. 365-68.

In this regard, the South had the best of both worlds on the issue of the federal judiciary and its reform. The Southern and Democratic majority on the Court made it congenial to the perpetuation of their unique Constitutional theory. They could accept reform so long as it did not mean a dilution of the power of the Court through either an over great reduction in its size or a vitiation of its ability to speak with a final voice on critical *national* issues such as slavery expansion. Butler demonstrated this by his hostility to the erection of an intermediate court of appeals, and his refusal to accept the role of popular will in the judicial decision-making process. Proslavery constitutional theory was "a doctrine of power, not a doctrine of rights."[54] If its own scheme of reform would not be accepted, then the South could retreat to the *status quo* which offered the advantage of partisan and sectional strength on the high bench, and a creaking federal judiciary which, if it should tread on Southern interests, could be readily corrected by the Supreme Court.

54. Bestor, *op. cit. supra*, note 2, at p. 180.